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LIABILITY TO PROSECUTION FOR DAMAGES IN ABDOMINAL SURGERY.*

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However the verdict, a suit for damages is a financial as well as professional misfortune. Even the experienced and skillful operator may be compelled to defend himself against the malicious and greedy, and, on account of the discredit usually thrown upon expert testimony, the truth is not always ascertained, and justice at times may be defeated.

While the moral responsibility is the same in every surgical case, the legal responsibility varies according to the gravity of individual cases and results of treatment; therefore, when the abdominal surgeon is made defendant in a suit, the claim for damages is not likely to be insignificant.

Priests once assumed to treat the sick, and even to perform surgical operations, their knowledge and power to do so having been regarded as a divine gift; therefore results were accepted whether good or bad. In some countries, as in Egypt, corporal punishment was inflicted upon those who ventured to depart from recognized and well-established surgical rules, though the results were favorable. In others (Roumania) unsuccessful results made the surgeon liable for damages, however skillfully he may have treated the case. In others, again (Goths), if the patient dies, the surgeon is delivered to the relatives and friends, who wreak vengeance upon him. In Germany the surgeon is held strictly accountable in the event of the death of the patient, unless he has exercised due care and taken proper precaution, though he may be incapable or unskillful and the patient may have employed him and agreed to pay him. While the law does not assume that the surgeon agrees to cure, it very properly demands of him reasonable skill and knowledge (Hamilton and others).

* Read before the American Gynæcological Society, May 26, 1896.

Women especially are horrified at the suggestion of a surgical operation, and are naturally averse to it. Exceptionally, however, a woman rather enjoys the prominence given her, regarding herself something of a heroine ; but in rural communities in which operations are only occasional, it is always difficult, sometimes impossible, to get the consent of the patient or her friends at all, she preferring to endure her condition to taking the unavoidable risks of an operation, however slight they may be. Sometimes consent is given conditionally—that is, if unexpected conditions enhancing the risk are encountered, the surgeon must promise to proceed no further. Though uncommon, such an instance is the source of infinite trial and annoyance, and a violation of the promise if unfortunately made, may be the basis of a suit for damages.

Mrs. T., aged thirty-five, of healthy appearance, came under observation in December, 1894. She had never been pregnant, and menstruation had been regular up to October, since which time it had not reappeared. It began when she was fourteen years old, and had never been excessive. She had slight leucorrhœa.

The abdomen was about as large as at seven months' pregnancy, measuring 35.5 inches in its largest circumference, and due to an abdominal tumor of some kind, of distinct outline, resilient to the touch and movable, but fluctuation could not be detected. The surface of the tumor was smooth and regular, did not dip down into the pelvic cavity, and could not be distinguished from the uterus ; it was apparently the uterus itself.

The patient had never been seriously ill and had first noticed the tumor about two years ago, the growth of which had been slow until within the last six months. The attending physician had diagnosticated ovarian cystoma. She was informed that though the diagnosis might be correct, there was considerable doubt, which would disappear on opening the abdomen, but should the tumor prove to be an ovarian cyst, there would be less risk in the operation than if any other condition should exist. At this point she insisted that she would take no further risk than that involved in the removal of an ovarian cyst, and would consent to the operation only on condition that if the tumor were found to be other than ovarian the operation should proceed no further. While it is, of course, plain that the operation should have been declined under such restrictions, still there was a probability that before the operation she could be persuaded that her greater safety would depend upon permitting the operator to use his best judgment and to do whatever seemed best

under the circumstances. There was a slight hope, too, that the tumor might be ovarian. All persuasion, however, was unavailing, and the operation was undertaken only as an exploration, still with the hope that the husband would allow to be done whatever might seem best. An explorative operation was performed December 24, 1894, revealing an œdematous myoma. The husband, who was in another room, was informed of the result and of the favorable prospect for recovery should the operation proceed, but he absolutely refused to permit anything further to be done. Had the operation proceeded without consulting the husband and the patient recovered, all would have been well; had the result been fatal, however, the avenue to a suit for damages would have been open and would probably have been speedily entered. The tumor could have been easily removed with but little greater risk, and the patient no doubt would have recovered as well from a completed as she did from the explorative operation. The course pursued in this case was in deference to the judgment of the patient's physician, who was assisting in the operation.

In contemplation of an operation, an understanding can usually be had with the patient and friends; exceptionally, however, contingencies may arise making it impracticable, even impossible, to do so. The question arises whether under such circumstances an urgent operation should be undertaken with all the attendant risks.

The following is a recent experience: Patient thirty-nine years old, mother of one child born twenty years ago. The uterus was displaced backward, partially fixed, and very tender to the touch. It was considerably enlarged, and there was a profuse muco-purulent discharge from its cavity. The general condition was fair, though the accompanying symptoms of chronic endometritis were present in a marked degree. Examination under anæsthesia failed to reveal either disease of the ovaries or tubes, both being of normal size. Curettage, irrigation, and drainage was the treatment employed. Not an unpleasant symptom arose until the morning of the ninth day. About nine o'clock, having just eaten her breakfast, the patient was suddenly seized with violent and excruciating pain in the region of the left ovary. She was seen within an hour after the onset of the attack, and though the nurse had given a quarter of a grain of morphine hypodermically and an ounce or more of whisky, she was almost in collapse. The countenance was anxious, nose pinched, lips livid, temperature 99°, and pulse 134, small and weak. There was not the slightest distention of the abdomen, but it was extremely sensitive

over its entire surface. Vaginal examination gave negative results. Evidently some terrible accident had happened within the abdomen, and the indications for immediate abdominal section were perfectly plain. When consultants arrived within about two hours after the onset of pain the symptoms were less urgent, and it was concluded that the chances for recovery would be better without immediate resort to operation. Improvement, though slight, continued throughout the day, but there was recurrence of pain, and symptoms of collapse came on about 9 P. M. The patient gradually grew worse until the following night, when she died.

After much coaxing, the husband finally consented to a post-mortem examination, which was confined to the abdominal and pelvic cavities. The peritoneal cavity contained about half a pint of pus. The right tube and ovary were normal. The left tube was normal, but the ovary, though of normal size, had ruptured along its convex border, the rupture no doubt occurring at the onset of pain. The tunic was easily torn, and was as thin as peritonæum. Whether the ovary had undergone cystic or purulent degeneration, its contents had been sufficiently irritating to produce a rapidly fatal peritonitis. When the patient had been examined under anæsthesia, this diseased ovary could be distinctly made out, and appeared as healthy as the other.

During the first two hours after the onset of pain abdominal section might have been done, but the husband and friends were in a distant town, assistants were not at hand, and the patient was too ill to talk or to be consulted. Skilled nurses, however, were at hand, and the operation could have been readily done, and perhaps should have been done, notwithstanding all the attendant risks.

When the attack of pain again came on, however, death was inevitable.

The average jurvman places the same estimate upon expert as upon any other testimony. One is of equal value with the other. The function of the witness is to testify in behalf of the side calling him. He is supposed to be biased in favor of that side. If an expert, he is paid for his testimony. Parties to a suit select a witness with reference to his ability to strengthen their respective sides, and if an expert, they regard him in much the same light as the juror. He is expected to testify in their behalf. Courts, too, are inclined to underestimate the value of expert testimony. Lord Campbell has said that "skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence." There is much need of reform in

this direction. An expert witness should be considered as such only when he is known to possess special qualifications, and to have had sufficient experience to entitle his opinion to some weight. A chemist can not give reliable evidence in a surgical case, neither can a surgeon give valuable evidence in questions pertaining to general medicine. Instead of his selection on such a basis, his opinion as to the case in question is first sought, and, unless it strengthens that side or weakens the other, his evidence is not desirable. So-called experts are known to have been called because they would testify to anything desired.

An attorney was recently asked if a certain witness knew anything on the subject in question. He replied that "he was not called on that account." Until the time comes when courts shall fix the proper status for medical witnesses demoralization will exist. "As the law is administered, many persons can be found who are ready to arrogate knowledge and position they do not deserve. The dignified alienist of experience and reputation is confronted by the impostor whose glib manner and bizarre 'popular science' sometimes impresses the susceptible juryman, as does the proprietary-medicine advertisment, and whose experience of medicine and its exponents is confined to the quack or cure-all. The law is largely responsible for this" (Hamilton).

In any case the sympathies of a jury govern them largely in determining a verdict. Sympathy that overcomes judgment and ignorance generally go hand in hand. The jury naturally incline toward the side most in need of a favorable verdict, sometimes with little regard as to the merits of a case. It is a well-recognized fact that in suits against corporations the verdict is generally adverse.

The following interesting case recently came before the Common Pleas Court of Lucas County, Ohio. The surgeon was threatened with a suit for twenty thousand dollars damages, whereupon he immediately sued for the balance of his fee, a part having been paid. The defense set up a counter claim for three thousand dollars, in which was included hospital expenses, loss of time, etc. Furthermore, it was alleged that the operation was unnecessary, and, though the patient recovered from it, a broken-down nervous system, a ventral hernia, and a damaged eye resulted. The main points in the clinical history are as follows, and were kindly given by the surgeon himself: In August, 1893, tubal pregnancy of the right side was diagnosticated. In January (1894) following he doubted the correctness of his diagnosis. Motion was felt in February, and was also detected

by palpation. The enlargement was mainly on the right side. The uterine sound had been introduced in October and again in December, and the uterus found empty. Abdominal section was performed March 15, 1894—*nine months to a day from the last menstruation.* On opening the abdomen, the fœtal mass could be distinguished from the uterus, which was about as large as at a six months' normal pregnancy. At this stage of the operation *tubo-uterine pregnancy* was diagnosticated, and delivery by the vaginal route determined upon. The uterine cervix was dilated to the capacity of a Goodell's dilator, and dilatation completed by the hand. The uterus was found to be empty. The septum—consisting of the uterine wall—between the uterine cavity and the fœtal mass was torn through and the fœtus easily extracted. The placenta almost immediately followed, with scarcely any hæmorrhage at all. The fœtus was about as large as at six months—about sixteen inches in length though not well developed. The placenta, though small, was of normal appearance. To prevent the possibility of subsequent pregnancy, the ovaries and tubes, though normal, were removed. There was no lochial discharge until the ninth day, when it appeared, green in color, acrid and offensive. The claim for damages was based upon the allegation that an imposition had been practiced; that instead of a tubo-uterine the case was one of normal pregnancy, which the operator should have known, and that, in addition, the accidents following the operation, together with the shock and prolonged convalescence, had made the woman a physical wreck. After the trial had gone on for two or three days a compromise was brought about and the case dismissed.

Whatever may have been the merits of this case, the verdict would almost certainly have been in favor of the defendant. From the juryman's standpoint, a frail, nervous, and mutilated woman was entitled to whatever damage she could get.

The difficulty of bringing out the truth by the usual method of examining witnesses, and the improbability of its recognition by the jury, could hardly have been made more apparent than in this case.

It is a curious fact that each attorney brought out exactly the desired answers from the same witness. In stating a hypothetical case, counsel would, of course, make it favorable to his side, and put his questions accordingly, expecting and usually getting a favorable reply. Expert testimony is in this way often made to appear inconsistent, and medical witnesses are compelled to disagree when opposite hypothetical questions are put to them. To this method of examining witnesses, perhaps more than to anything else, is due the

disrepute of expert medical evidence. Instead of the witness giving facts, by this very method he becomes more or less of a partisan.

"The hypothetical question is supposed to embody the facts of the case, but in reality is often distorted, disingenuous, and is roughly handled and more or less emasculated before the witness is allowed to pass judgment upon it. When the answer is given, the medical gentleman in the witness chair is obliged to consider section by section, and an attempt is made to elicit a categorical answer, which is often impossible" (Hamilton).

Speaking of the plans for reform in calling expert witnesses, Mr. Lawrence Godkin, in his contribution to Hamilton's work, says that "the plan suggested by Sir James Fitzjames Stephen in his *History of the Criminal Law of England* would seem to meet the situation, although it is one which requires a very high standard of medical honor and knowledge. Under this plan, which he says has existed for some time at Leeds, England, medical men refuse to testify without conference with the expert witnesses to be called on the other side of the case, and that as a result medical witnesses are rarely cross-examined at all, and not unfrequently they are called on one side only. He further says "that if such a system could be adopted by the profession in America it would be of immense service in raising the standard of expert testimony and increasing the reliance placed upon it by the courts and juries." He still further suggests that the adoption of such a plan by the medical profession would solve the problem. "And not its least merit lies in the fact that it may thus be brought about by the members of the profession taking the matter into their own hands and dealing with it upon the lofty and disinterested plane upon which the medical profession should be moving on to the great future which, as an instrumentality for the attainment of righteousness and justice, as well as the retarder of death and the alleviator of human suffering, is surely before it."

Mr. Clarence Brown, of Toledo, who was plaintiff's counsel in the foregoing case, and whose legal qualifications and experience entitles his opinion to great weight, was asked the following question: Would a surgeon be liable for damages should he open the abdomen in an urgent case—one certain to die without it—were it impossible to get the consent of husband or friends?

Mr. Brown kindly wrote his reply, received when this paper was nearly completed, and which I have much pleasure in giving in full as follows:

May 13, 1896.

My dear Doctor: Only a very general answer can be given to your question as to whether a surgeon would be liable for damages should he open the abdomen in an urgent case—one certain to die without it—were it impossible to get the consent of husband or friends. The surgeon is held to the exercise of ordinary care in the performance of an operation. Ordinary care in such matters, of course, means such care as one ordinarily educated and skilled in his profession exercises under like circumstances, having in mind always the dangerous character of the operation. The degree of care required is always enhanced by the hazardous character of the operation to be performed. A surgeon does not guarantee success or recovery. He is bound to act in good faith. He is required to be competent and skillful. He must use those means and resort to those remedies and operations which the best intelligence of the profession adopt as proper under the circumstances.

The placing of a patient under the care of a physician and surgeon implies an authority in the surgeon to do that which is reasonably necessary in the case; and if, in the honest judgment of an experienced and competent surgeon, such an operation were necessary, and a proper regard for the chances of the patient required that it be performed speedily and before opportunity for conference with, or obtaining consent from, the relatives or friends, I think a surgeon would not be liable for damages should he perform the operation in an urgent case such as you mention, even although it might result unsuccessfully.

Concerning the other matters suggested in your letter, I do not know that I can speak with any great definiteness without knowing the general character and scope of your paper. I am clearly of the opinion that the present method of calling expert medical witnesses on either side of a case involving a medical question does not materially tend to the elucidation of the truth upon that question in a public trial. In any important case of that character the medical question involved is usually one of such difficulty and importance that reputable physicians might well differ in regard thereto, even were they reliably advised as to the exact facts and history of the case. It is apparent, therefore, that where medical witnesses must be called to testify in response to hypothetical questions framed upon any theory of the facts which the testimony of either party tends to establish, reconcilement of opposing views of medical witnesses becomes an impossibility.

Not only that, but accordingly as questions may be framed by skillful counsel upon one side or the other, the same witness may appear in the attitude of having given directly conflicting views on what appears to the inexperienced to be practically the same hypothetical case.

The medical question involved in such a case is often one upon which even an experienced and skillful physician could not venture an opinion without the most careful investigation into the history, condition, and treatment of the case. How much less, then, could it be expected that a jury, uneducated in the medical profession, unfamiliar with even the medical terms, and incapable, in the limited time and opportunity that is afforded them, of even appreciating the testimony of medical experts—how much less could such a body of men be expected to intelligently pass upon such grave and uncertain problems?

In my opinion, a much better way to try such questions would be to provide a medical commission, consisting, say, of three reputable and experienced members of the medical profession, to be appointed by the Court, to hear and determine the medical question involved in the case, and, upon their report, let the case proceed to final judgment, according to the usual processes of the law. The distinctions and refinements made in all such inquiries would be appreciated by such a commission. They can not be appreciated nor be made clear by the methods usually adopted in jury trials. With a determination by such a commission of the medical question involved in a case, there would be little difficulty in disposing of the other questions.

Yours very truly, CLARENCE BROWN.

In the miscellaneous department of the *Journal of the American Medical Association* appears an item stating that a case has recently been decided in Brussels as to whether the husband's consent to an operation is indispensable. Two prominent surgeons had been prosecuted by the husband whose wife died from an operation unauthorized either by himself or his wife. The verdict was in favor of the surgeons.